

٧٢

October 28, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE COMMISSION

November 3, 2004 (11:35AM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of:

DUKE ENERGY CORPORATION

(Catawba Nuclear Station,
Units 1 and 2)

Docket Nos. 50-413-OLA
50-414-OLA

**DUKE ENERGY CORPORATION'S RESPONSE TO MOTION
FOR RECONSIDERATION OF CLI-04-29**

David A. Repka
Mark J. Wetterhahn
Anne W. Cottingham
WINSTON & STRAWN LLP
1400 L Street, NW
Washington, D.C. 20005-3502
(202) 371-5726

Timika Shafeek-Horton
DUKE ENERGY CORPORATION
422 South Church Street
Mail Code: PB05E
Charlotte, N.C. 28201-1244

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	BACKGROUND	2
III.	ARGUMENT	4
A.	The Commission Did Not Prejudge BREDL's Case on the Merits.....	7
B.	The Guidance Documents Are Not Relevant Because They Do Not Describe the Detail of an Applicable Design Basis Threat.....	10
C.	Disclosure of the Requested Documents is Not Necessary to the Presentation of BREDL's Case in Contention 5.....	12
D.	The Commission Should Clarify its Expectations Regarding Litigation of "Attractiveness" of MOX Fuel and the Applicable DBT	14
IV.	CONCLUSION.....	16

TABLE OF AUTHORITIES

NUCLEAR REGULATORY COMMISSION CASES

<i>Commission Statement of Policy on Conduct of Adjudicatory Proceedings</i> , CLI-98-12, 48 N.R.C. 18 (1998).....	9
<i>Dominion Nuclear Connecticut, Inc.</i> (Millstone Nuclear Power Station, Units 2 and 3), CLI-03-18, 58 N.R.C. 433 (2003).....	6
<i>Dominion Nuclear Connecticut, Inc.</i> (Millstone Nuclear Power Station, Units 2 and 3), CLI-02-1, 55 N.R.C. 1 (2002).....	6
<i>Duke Energy Corp.</i> (Catawba Nuclear Station, Units 1 and 2), CLI-04-29, 60 NRC ____ (slip. op. Oct. 7, 2004)	passim
<i>Duke Energy Corp.</i> (Catawba Nuclear Station, Units 1 and 2), CLI-04-19, 60 N.R.C. 5 (2004).....	2, 7
<i>Duke Energy Corp.</i> (Catawba Nuclear Station, Units 1 and 2), CLI-04-11, 59 N.R.C. 203 (2004).....	2
<i>Duke Energy Corp.</i> (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 N.R.C. 62 (2004).....	2, 3
<i>Duke Energy Corp.</i> (Catawba Nuclear Station, Units 1 and 2), LBP-04-21, 60 N.R.C. ____ (slip op. Sept. 17, 2004).....	4
<i>Duke Energy Corp.</i> (Catawba Nuclear Station, Units 1 and 2), ASLBP-03-815-03-OLA (slip op. April 12, 2004) (Safeguards)	3
<i>Pub. Serv. Co. of Colorado</i> (Fort St. Vrain Nuclear Generating Station), Exemption (docket no. 50-267).....	11
<i>Pub. Serv. Co. of New Hampshire</i> (Seabrook Station, Units 1 and 2), CLI-90-3, 31 N.R.C. 219 (1990).....	9

NRC REGULATIONS

10 C.F.R. Part 2, Subpart I.....	4
10 C.F.R. Part 50.....	11, 14, 15, 16
10 C.F.R. § 2.730	1

10 C.F.R. § 2.786.....	1
10 C.F.R. § 2.905.....	4, 7
10 C.F.R. §§ 73.1(a).....	passim

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

1

information that would warrant reconsideration of the prior result. However, as discussed further below, the Motion and recent developments in the proceeding suggest a need for further clarification and guidance from the Commission.

II. BACKGROUND

The history of this proceeding as it relates to security issues is set forth in several previous Commission decisions, including CLI-04-6,⁴ CLI-04-11,⁵ and CLI-04-19.⁶ In brief, on September 15, 2003, Duke filed proposed revisions to the Catawba Nuclear Station ("Catawba") physical security plan and a related request for exemption in connection with its February 27, 2003, license amendment request ("LAR") to allow the use of four mixed oxide ("MOX") fuel lead test assemblies at Catawba to support a Department of Energy ("DOE") non-proliferation program.⁷ The Atomic Safety and Licensing Board ("Licensing Board") subsequently admitted one reformulated contention, BREDL Security Contention 5.⁸ Discovery on that contention has

reconsideration. CLI-04-29, at 3, n. 10. This being so, Duke should certainly be allowed to respond to any such petition.

⁴ *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62 (2004).

⁵ *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-11, 59 NRC 203 (2004).

⁶ *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-19, 60 NRC 5 (2004).

⁷ The requested exemptions are related solely to the security of the MOX lead assemblies during a limited period (days or perhaps weeks) after their arrival on site and before insertion into the reactor, at which point they are considered self-protecting.

⁸ As reframed by the Licensing Board, Security Contention 5 is very general in nature. It does not articulate, by its terms, any specific alleged vulnerability or theft "scenario." It reads as follows:

Duke has failed to show, under 10 C.F.R. § 11.9 and 10 C.F.R. § 73.5, that the requested exemptions from 10 C.F.R. § 73.46, subsections (c)(1);

been ongoing since June 2004. Noting that Duke had already made available its security plan for implementing the LAR, the Commission ruled in CLI-04-6 that: "More general security information related to the Catawba plant-at-large . . . is not, in our judgment, 'necessary' to allow BREDL to participate meaningfully in this license amendment proceeding." CLI-04-6, 59 NRC at 72. Nonetheless, during discovery on Security Contention 5, Duke has provided BREDL with considerable additional information dealing with security planning and implementation at Catawba.⁹

With respect to the current issue, BREDL additionally sought access to two documents described by an NRC Staff transmittal letter as follows: "(NRC) guidance documents for the design basis threat (DBT) for theft or diversion and the DBT for radiological sabotage to be used in the design of the mixed oxide fuel fabrication facility (MOX FFF) with respect to safeguards and security."¹⁰ Both the "Sabotage DBT" and the "Theft/Diversions DBT" regulatory guidance for the MOX FFF are classified by the NRC Staff as National Security Information ("NSI"). Accordingly, the NRC Staff determined that requests for this information

(h)(3) and (b)(3)-(12); and (d)(9) are authorized by law, will not constitute an undue risk to the common defense and security, and otherwise would be consistent with law and in the public interest.

See Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), ASLBP-03-815-03-OLA (slip op. April 12, 2004) (Safeguards).

⁹ As discussed below, such information includes numerous Safeguards procedures, including the armed response procedure which provides the location and actions of each armed responder to an attempt at theft or radiological sabotage, locations of security cameras and other security features, and detailed site and plant drawings.

¹⁰ The two classified documents in question are referenced in and enclosed with a March 13, 2000 letter from Mr. Michael F. Weber, Director, Division of Fuel Cycle Safety and Safeguards, NRC Office of Nuclear Material Safety and Safeguards, to Mr. Peter Hastings, Duke Engineering & Services, Inc., under the subject heading "Design Basis Threat Guidance Applicable to the Mixed Oxide Fuel Fabrication Facility."

needed to be made to the Licensing Board, pursuant to 10 C.F.R. Part 2, Subpart I.¹¹ Duke opposed the request for access and asked that the Licensing Board certify the issue to the Commission, consistent with 10 C.F.R. § 2.905.¹²

After reviewing the documents, the Licensing Board ruled from the bench that BREDL had the requisite “need to know,” and it granted the request for access to the documents. Tr. 3223-3232 (Sept. 9, 2004) (Safeguards). The Licensing Board later explained its ruling in a Memorandum and Order, LBP-04-21, dated September 17, 2004, and referred the ruling to the Commission.¹³ In CLI-04-29, the Commission accepted the referral, clarified the “need to know” standard as it pertains to discovery (essentially approving the standard applied by the Licensing Board), and reversed the result reached by the Licensing Board on the two NSI-classified documents at issue.

III. ARGUMENT

In its Motion, at 2-3, BREDL describes the two NSI-classified documents presently at issue as follows:

The DBT for sabotage and theft or diversion of formula quantities of SSNM is described in 10 C.F.R. §§ 73.1(a)(1) and (2). In promulgating the regulation, the Commission withheld some of the details about the

¹¹ See August 19, 2004 letter from Antonio Fernandez, NRC Office of General Counsel, to Diane Curran, counsel for BREDL, and Mark J. Wetterhahn, counsel for Duke.

¹² See “Duke Energy Corporation’s Response to Blue Ridge Environmental Defense League’s Request for Need-to-Know Determination on Classified Regulatory Guidance for NRC Category I Facilities” (Aug. 31, 2004). Duke also requested that if the Licensing Board granted BREDL’s request for access, the Board make the subject documents available to Duke’s attorneys, representatives, and consultants who have the required security clearance. See “Duke Energy Corporation’s Request for Action under Subpart I of 10 C.F.R. Part 2” (August 27, 2004).

¹³ See “Memorandum and Order (Finding Need-to-Know By Intervenor Regarding Certain Classified Documents and Referring Ruling to Commission),” LBP-04-21, 60 NRC ____ (Sept. 17, 2004, slip op. at 14-25).

DBT from the regulations, and instead set them forth in two integrally related guidance documents: “Design Basis Threat for Theft or Diversion Guidance” (hereinafter “DBT Guidance for Theft/Diversion”) and “Design Basis Threat for Radiological Sabotage Guidance” (hereinafter “DBT Guidance for Radiological Sabotage”).

At the threshold, this appears to be a mischaracterization of the documents. BREDL portrays the two documents as if they are guidance of generic applicability regarding the DBT, developed with and integrally related to the regulations in 10 C.F.R. §§ 73.1(a)(1) and (2). This characterization is not consistent with the Commission’s own description of the documents in CLI-04-29, based on actual knowledge of the documents and the Commission’s participation in formulating the documents. The Commission there stated:

As we are fully aware, and the Board perhaps was not, the guidance in question relates only to the design basis threats for sabotage and for theft or diversion of formula quantities of strategic special nuclear material at the Category 1 facilities in existence in 2000 — that is, the fuel fabrication facilities operated by Nuclear Fuel Services, Inc. (NFS) and BWX Technologies (BWXT).^{*} At that time there was no Category I facility license that was similar to Catawba in terms of the form in which the material would be possessed or the activities for which the material would be used.

^{*}The guidance documents are *potentially* applicable to the mixed oxide fuel fabrication facility that Duke Cogema Stone & Webster has proposed for the Department of Energy’s Savannah River site. This fuel fabrication facility, if built, will be a Category I facility that will have more in common with NFS and BWXT than does Catawba.

CLI-04-29, slip op. at 7 and n. 27 (emphasis in original). Accordingly, BREDL starts from a faulty premise regarding what it seeks. BREDL’s faulty premise regarding the nature of the documents infects much of its reasoning, often leading to circular arguments. For example, BREDL bases its argument for “need to know” on a premise of generic applicability and relevance that is simply not accurate. *Id.* Moreover, as discussed on the record below and acknowledged by the Commission in CLI-04-29 (slip op. at 8), Duke has never had possession of

the two NSI-classified documents and did not rely upon them in preparing the MOX fuel LAR and security exemption requests. The documents were not provided to Duke by the NRC Staff in connection with Duke's application and are not referenced in the NRC Staff's specific security review plan developed for the MOX fuel LAR and exemption request,¹⁴ or in the safety evaluation documenting the NRC Staff's review.¹⁵ Therefore, BREDL's claims of overriding need are unfounded.

In its Motion, BREDL specifically argues that the Commission erred for three reasons. Each of these arguments is further discussed below. In total, BREDL has not demonstrated any legal or factual error in CLI-04-29 that warrants reconsideration of that Order.¹⁶ However, BREDL's Motion and recent developments in this proceeding suggest that further clarification from the Commission is warranted.

¹⁴ Memorandum, Joseph W. Shea to Glenn M. Tracy, "Review Plan for Evaluating the Physical Security Protection Measures Needed for Mixed Oxide Fuel and its Use in Commercial Nuclear Power Reactors," dated January 29, 2004 ("NRC Review Plan").

¹⁵ See May 5, 2004 letter from Robert Martin, NRC, to H.B. Barron, Duke Energy Corporation, regarding "Supplement 1 to Safety Evaluation for Proposed Amendments to the Facility Operating License and Technical Specifications to Allow Insertion of Mixed Oxide Fuel Lead Assemblies (TAC Nos. MC 0824 and MC 0825)," enclosing safeguards and non-safeguards versions of the "Safety Evaluation by the Office of Nuclear Security and Incident Response Related to Amendment No. ___ to Facility Operating License NPF-35 and Amendment No. ___ to Facility Operating License NPF-52, Duke Energy Corporation, Catawba Nuclear Station, Units 1 and 2, Docket Nos. 50-413 and 50-414."

¹⁶ In NRC practice, "reconsideration petitions must establish an error in a Commission decision, based upon an elaboration or refinement of an argument already made, an overlooked controlling decision or principle of law, or a factual clarification." *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-02-1, 55 NRC 1, 2 (2002) (internal citations omitted). Motions for reconsideration "should not be used merely to 're-argue matters that the Commission already [has] considered' but rejected." *Id.*; see also *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-03-18, 58 NRC 433, 434 (2003). See also *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-2, 55 NRC 5, 7 (2002) (Motions for reconsideration "are an opportunity to request correction

A. The Commission Did Not Prejudge BREDL's Case on the Merits

In CLI-04-29, the Commission specifically addressed BREDL's (and Duke's) "need to know" with respect to the two classified documents. BREDL argues that the Commission's decision on "need to know" is based on "a set of factual determinations that go straight to the merits of this case" (Motion at 5) and that "the Commission has already decided that Duke's request for exemptions from the Category I security regulations should be granted" (*id.* at 6). None of this, however, is an accurate assessment of CLI-04-29. The Commission's decision (at least the portion for which BREDL seeks reconsideration) makes a "need to know" determination, as the Commission is clearly authorized to do by the regulations. *See, e.g.*, 10 C.F.R. § 2.905(d). In making that determination, the Commission — as discussed above — characterized the two classified documents at issue based on its own knowledge of those documents. CLI-04-29, slip op. at 7. The "need to know" finding is committed to the Commission's discretion. There is no requirement for an evidentiary hearing on a "need to know" determination and nothing unlawful in the Commission's making such a determination.

In making its need-to-know determination, the Commission was obviously required to review the documents and assess their applicability. The Commission observed, as it has before in this proceeding, that Duke's Catawba Nuclear Station is a very different facility from the NFS and BWXT fuel cycle facilities for which the 2000 DBT guidance that BREDL is seeking was prepared. CLI-04-29, slip op. at 8. *See also* CLI-04-19, 60 NRC at 11-12. Moreover, the Commission observed in making its determination that "the MOX material is not nearly as attractive to potential adversaries from a theft and diversion standpoint as the material

of [an] error by refining an argument, or by pointing out a factual misapprehension or a controlling decision or law that was overlooked.”).

at the existing NFS and BWXT facilities.” CLI-04-29, slip op. at 8.¹⁷ These are both clearly relevant considerations in the “need to know” assessment. While they are also important observations with respect to the issues raised in Contention 5, it is an overstatement in the extreme to argue that the Commission’s decision is a prejudgment on the merits of BREDL’s contention. Given the focus of Contention 5 on the exemption request, as well as the discovery responses to date, the litigation of Contention 5 will quite clearly focus on whether Duke has met its burden of demonstrating that the requested exemptions should be granted, considering among other things the sufficiency of Duke’s physical security plans to address BREDL’s specific theft scenario.

Any security response capability will ultimately need to be assessed against a standard, *i.e.*, a DBT. Catawba’s security plans for MOX fuel are no different in this respect. In CLI-04-29, the Commission has provided guidance to the Licensing Board, BREDL, and the other parties in this proceeding regarding the DBT to be applied, based on its assessment of the relative attractiveness of MOX fuel as a theft target. The Commission stated:

For these reasons, it is clear to the Commission that while Catawba would technically be a Category I facility, there is no rational reason for Catawba to have a significantly different level of security than is already existing at the reactor site.* Therefore, dissemination to the intervenor of Category I security guidance that applies to the BWXT and NFS facilities would be unnecessary and inappropriate.

*We leave it to the Board to determine whether the specific measures Duke has proposed are adequate to protect the public health and safety.

CLI-04-29, slip op. at 9, and n. 34. Significantly, the Commission is not addressing the “merits” of the case here. It is addressing an important legal and policy question germane to the novel

¹⁷ This is a conclusion entirely consistent with the NRC Staff’s assessment of relative attractiveness of the MOX fuel assemblies inherent in its January 2004 Review Plan for

circumstances presented by the MOX fuel lead assembly proposal. This is something the Commission is also clearly authorized to do.¹⁸ As indicated by the cited footnote above, the Commission has left to the Licensing Board the task of determining whether the standard for an exemption has been met.

BREDL additionally complains that the Commission's decision is prejudicial to BREDL "because it necessarily depends on the very information that the Commission has withheld from BREDL." Motion at 6. At best, this is a very puzzling argument. Certainly the Commission, in conducting an *in camera* review of the documents to determine whether there is a "need to know" on the part of any of the parties, must review the documents and rely on what is there regarding their scope of applicability. This in fact is always the situation where the reviewing body denies access to a Safeguards or classified document.

Furthermore, the specific information in the guidance documents regarding the DBT relating to the Category I facilities covered by the documents (e.g., "the size of the hypothetical attack force") is not central to either the "need to know" or the issue of the relative attractiveness of the MOX fuel assemblies. "Need to know" depends on whether the guidance

the Duke application and explicit in its May 2004 Safety Evaluation of the proposal.

¹⁸ For example, in its 1998 Policy Statement on Conduct of Adjudicatory Proceedings, the Commission made clear its intention to "monitor its proceedings to ensure that they are being concluded in a fair and timely fashion," and to "take action in individual proceedings, as appropriate, to provide guidance to the boards and parties and to decide issues in the interest of a prompt and effective resolution of the matters set for adjudication." *Commission Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 25 (1998); see also *Pub. Serv. Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 229 (1990) ("[B]y regulation and a long line of case precedent, the Commission has explicitly retained supervisory power to step in at any stage of a proceeding to decide any matter itself. The Commission's authority to intervene and provide guidance in a pending proceeding is not limited by the terms of 10 C.F.R. § 2.786(a) [regulation stating the ordinary practice for review].") (citation omitted).

documents are intended to apply in the present circumstances. As the Commission explained, those documents *do not* apply to the MOX fuel lead assemblies, at least in part due to the relative lack of attractiveness of the MOX fuel assemblies. CLI-04-29, slip op. at 8-9. Contrary to BREDL's argument, attractiveness depends on the nature or form of the material, not on the DBT defined by the NRC (e.g., the number of attackers).¹⁹ The Commission did not err in deciding that the DBT in the guidance documents for different facilities with different types of materials does not apply to Catawba. CLI-04-29, slip op. at 9-10.

B. The Guidance Documents Are Not Relevant Because They Do Not Describe the Detail of an Applicable Design Basis Threat

BREDL next argues, contrary to the clear explanation in CLI-04-29, that the guidance documents are relevant (and that BREDL has a "need to know") because they describe the applicable DBT. Motion at 7-8. While the Commission has said that this is not so, BREDL nonetheless argues that the DBT *must* apply because the DBT depends on the quantity of strategic special nuclear material ("SSNM"), not on the nature of the facility. *Id.* at 7. Further, BREDL cites the introductory language in the guidance documents cited by the Licensing Board for the proposition that the guidance documents define the characteristics of the adversary, which BREDL maintains must be applied independent of the characteristics of the facility. *Id.* at 8. These arguments are also flawed.

¹⁹ *Id.*, slip op. at 8; NRC Security Safety Evaluation at 2. BREDL states that, in order to make a determination on "attractiveness," one must know the number of attackers and how they are equipped because "[t]he larger and more equipped the group of adversaries, the more feasible theft will be, and the more attractive the MOX fuel will be to thieves." Motion at 6. However, BREDL has it backwards. Adversary characteristics are not a factor in determining the attractiveness of special nuclear material; the material's physical characteristics are the only factor relevant to that inquiry. The relative attractiveness of the material determines the capabilities and characteristics of the adversaries that must be assumed, not vice versa. A less attractive form of material would warrant consideration of only a smaller attacking force.

First, the DBT is established in the Commission's regulations, not in guidance documents. The DBT in the regulations will depend upon the quantity of SSNM, regardless of the type of facility. (This is the situation that necessitated the Catawba exemption request.) However, the Commission has retained the flexibility and discretion to impose different sets of specific adversary characteristics for different combinations of types of licensed facilities and different forms of materials. Not all guidance documents providing details for the DBT in the regulations are applicable to all NRC facilities, regardless of the type of facility or form of material. The regulations in Section 73.1(a) themselves are written in broad terms, thereby allowing some appropriate variations or gradations in adversary characteristics.²⁰

Second, the Commission is quite clear in CLI-04-29 that the 2000 DBT guidance documents (which are only an interpretation of a regulation) were not intended to apply, and will not apply, to a power reactor facility. See CLI-04-29, slip op. at 9 ("That guidance does not extend to Catawba."). Duke assumed in its exemption request that a Category I facility must, pursuant to 10 C.F.R. § 73.1(a)(2), provide security with respect to a theft or diversion scenario with unirradiated MOX fuel present. The Commission's decision confirms Duke's further assumption that the detailed adversary characteristics to be applied to Catawba for a theft scenario will be essentially equivalent to the applicable Part 50 facility adversary characteristics for radiological sabotage.²¹ Contrary to BREDL's argument, the Commission's decision does

²⁰ The Commission has also previously granted an exemption to Ft. St. Vrain for requirements of Part 73 because the site is not comparable to fuel facilities processing formula quantities of SSNM. See Jan. 19, 1989 letter from K. Heitner, NRC Office of Nuclear Reactor Regulation, to R.O. Williams, Jr., Public Service Company of Colorado, transmitting *Public Serv. Co. of Colorado* (Fort St. Vrain Nuclear Generating Station), "Exemption" from certain safeguards requirements (docket no. 50-267).

²¹ These characteristics would meet the DBT mandated by 10 C.F.R. §§ 73.1(a)(1) and (2) for both radiological sabotage and theft.

not constitute an error. The adversary characteristics in the guidance documents clearly are not universal and need not be universally applicable to all Category I facilities.

Finally, BREDL argues again that the Commission's decision on "need to know" represents a "prejudgment of the ultimate issue in BREDL's case, *i.e.*, whether the requested exemptions should be granted." Motion at 8. Obviously, this is not true. BREDL has presented a scenario by which it hopes to show a vulnerability in Duke's physical security plans to protect the MOX fuel from theft. Based on the Commission's guidance, this or any other posited scenario would be subject to a limit on the hypothetical adversary characteristics. BREDL may not pose an adversary that would require a "significantly different level of security than is already existing at the reactor site." CLI-04-29, slip op. at 9.²² Within this limitation BREDL has the opportunity to show that its theft scenario can succeed and that additional security measures (*i.e.*, those for which exemptions are requested) are necessary.²³ That will be an issue for hearing and that issue has not been prejudged in any sense.

C. Disclosure of the Requested Documents is Not Necessary to the Presentation of BREDL's Case in Contention 5

BREDL argues again that the two NSI-classified guidance documents are necessary to BREDL's case. Motion at 9. Ignoring the clear explanation in CLI-04-29, BREDL asserts that the documents "are highly relevant" (*id.*) and "have even higher status than ordinary

²² BREDL fails to acknowledge that the only significant increment between the DBTs for "theft and diversion" and "radiological sabotage" in 10 C.F.R. § 73.1(a)(1) and (2) is the addition of the requirement to consider individuals acting in conspiracy who have access to items that can facilitate theft of SNM. This is the only relevant increment in DBT against which Duke should be expected to protect through additional controls.

²³ To the extent the scenario exceeds the DBT adversary characteristics applicable to a nuclear power plant (including assumptions regarding the active participation of an insider), a successful scenario would not mandate relief. Similarly, relief could presumably not exceed the scope of the requirements for which exemptions are requested.

regulatory guides, because they flesh out details of the regulations that would have been included in 10 C.F.R. § 73.1 had they not been considered too ‘sensitive.’” *Id.* at 9-10 (citation omitted).²⁴ These assertions are simply untrue. For the reasons discussed above, there is no basis for BREDL’s argument that the two classified documents contain guidance applicable to all Category I facilities, and indeed the Commission has confirmed that they do not.

In fact, BREDL has been given unprecedented access to Safeguards Information in Duke’s Catawba physical security plan. Indeed, BREDL has been given far more information than Duke is comfortable providing, or has provided, to any person outside its security planning organization (aside from the NRC itself). BREDL has been given access to large portions of the Catawba Physical Security Plan (both the pre-existing plan and the plan as proposed to meet the NRC’s post-9/11 security orders), as well as numerous specific plant security implementing procedures, plant drawings, details on the locations of intrusion detectors and cameras, responses to NRC Requests for Additional Information, NRC OSRE Reports, OSRE preparation materials created by Duke, security drill evaluations, reports by security consultants, NRC Staff guidance documents, and other sensitive security material. BREDL representatives have also been given a day-long site tour at Catawba pointing out specific security arrangements. BREDL has clearly reviewed the material in detail and has posed a detailed scenario for review in this case. Thus, BREDL’s argument that two classified guidance documents, intended for completely different circumstances, are relevant and necessary (even “essential”) for BREDL to make its case is simply not credible.

²⁴ Further, BREDL claims that “[w]ithout this information, it is not possible to evaluate the attractiveness or vulnerability of the MOX fuel assemblies to theft.” *Id.* at 9. This argument is simply immaterial to the contention, for reasons previously discussed.

D. The Commission Should Clarify its Expectations Regarding Litigation of “Attractiveness” of MOX Fuel and the Applicable DBT

As discussed above, BREDL argues in its Motion that, in the Commission’s observations on the relative attractiveness of MOX fuel to thieves and on the applicable DBT, the Commission has decided the merits of Contention 5. Clearly, this is not the case. Conversely, however, the Commission — it seems to Duke — did not intend to convene a hearing on the relative attractiveness to terrorists of four MOX fuel assemblies nor to open to debate the Part 50 DBT it has set by plant-specific order. It appears from recent developments in this proceeding that further Commission clarification and guidance on these matters is warranted.

BREDL’s argument that the Commission, in its observations on attractiveness, has prejudged the case is undercut by BREDL’s own arguments to the Licensing Board this week. BREDL has argued below that the Commission’s statement in CLI-04-29 on the relative unattractiveness of MOX fuel (CLI-04-29, slip op. at 8-9) puts the “onus” on BREDL to “delve into” the issue of attractiveness, now more than ever. Tr. 3609, 3653 (Oct. 25, 2004). The Licensing Board even accepted this argument, or a variation of it, as a basis to order NRC Staff disclosure of a 1976 NRC document regarding a meeting in which attractiveness of MOX fuel was apparently discussed (subject to a Staff “need to know” determination). Tr. 3666-67 (Oct. 25, 2004) (The Licensing Board based its ruling in part on the “obvious significance” of the Commission’s language in CLI-04-29 relating to “attractiveness.”).²⁵ These arguments and conclusions seem at odds with the Commission’s intent in CLI-04-29. Accordingly, Duke suggests that there is a need for further clarification from the Commission — in the context of the present Motion — on whether litigation of the attractiveness issue is necessary. In Duke’s view, relative attractiveness of MOX fuel is germane only to the issue of defining the DBT. The

²⁵ See also Tr. 3626-29, 3633-34, 3645-48, 3661-63.

Commission has decided the latter issue in CLI-04-29, making relative attractiveness a non-issue in the proceeding.

The Commission, however, can and should provide further specific guidance on the DBT. In this regard, as this proceeding has unfolded, it has become increasingly clear to Duke that the Commission must set the specific adversary characteristics that make up the DBT for theft and diversion to be applied to Catawba during the interim between receipt of the MOX fuel assemblies at the site and insertion of these assemblies into the reactor. It is untenable for Duke, a private entity, to address that issue. Moreover, the Licensing Board — which is not privy to classified threat information — cannot reasonably be left to make significant policy determinations on security in an individual case. The Commission's statements in CLI-04-29 are clearly an attempt to provide the needed guidance. Duke recommends, however, that in addressing the current Motion, the Commission be even more specific to assure an efficient and timely resolution of this case. The Commission can and should weigh the relevant factors and state any specific changes (the "increment") from the 10 C.F.R. Part 50 DBT for radiological sabotage that will apply to Catawba, including any changes with respect to the number of attackers, the weaponry to be utilized, and the role of insider assistance. Duke maintains that the applicable Part 50 DBT and relevant Staff positions should apply.

As discussed above, the Commission has inherent supervisory authority to ensure a fair and timely hearing. In this case, Duke's LAR supports an important DOE non-proliferation initiative. Duke submitted its LAR more than two years prior to the date on which the amendment would be required. Given the schedule now adopted by the Licensing Board in this case (an evidentiary hearing is scheduled for January 2005), and the schedule for use of MOX fuel lead assemblies at Catawba (a May 2005 refueling outage for Unit 1 that requires

completion in March and April of final cycle-specific core design and receipt of new fuel), the issues raised by the security contention must be resolved efficiently. There is no margin in the schedule and no time for post-decision appeals to clarify issues such as the scope of the litigation and the applicable DBT. Therefore, prompt guidance to all parties is warranted.

IV. CONCLUSION

For the reasons discussed above, BREDL's motion for reconsideration should be denied. Moreover, Duke respectfully requests further clarification from the Commission regarding its expectations for: (1) any litigation of the issue of the relative "attractiveness" of MOX fuel; and (2) any changes from the applicable Part 50 DBT and adversary characteristics that must be assumed in the litigation of Contention 5.

Respectfully submitted,



David A. Repka
Mark J. Wetterhahn
Anne W. Cottingham
WINSTON & STRAWN LLP
1400 L Street, NW
Washington, D.C. 20005-3502
(202) 371-5726

Timika Shafeek-Horton
DUKE ENERGY CORPORATION
422 South Church Street
Mail Code: PB05E
Charlotte, N.C. 28201-1244

ATTORNEYS FOR DUKE ENERGY
CORPORATION

Dated in Washington, District of Columbia
This 28th day of October, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:)	
)	
DUKE ENERGY CORPORATION)	Docket Nos. 50-413-OLA
)	50-414-OLA
(Catawba Nuclear Station,)	
Units 1 and 2))	

CERTIFICATE OF SERVICE

I hereby certify that copies of "DUKE ENERGY CORPORATION'S RESPONSE TO MOTION FOR RECONSIDERATION OF CLI-04-29" in the captioned proceeding have been served on the following by deposit in the United States mail, first class, this 28th day of October, 2004. Additional e-mail service, designated by *, has been made this same day, as shown below.

Nils J. Diaz, Chairman
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, DC 20555-0001

Edward McGaffigan, Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, DC 20555-0001

Jeffrey S. Merrifield, Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, DC 20555-0001

Ann Marshall Young, Chairman**
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(e-mail: AMY@nrc.gov)

Anthony J. Baratta*
Administrative Judge
Atomic and Safety Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(e-mail: AJB5@nrc.gov)

Thomas S. Elleman*
Administrative Judge
5207 Creedmoor Road, #101
Raleigh, NC 27612
(e-mail: elleman@eos.ncsu.edu)

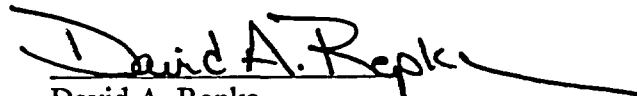
Office of the Secretary*
U.S. Nuclear Regulatory Commission
Washington, DC 20555
Attn: Rulemakings and Adjudications Staff
(original + two copies)
(e-mail: HEARINGDOCKET@nrc.gov)

Adjudicatory File
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Diane Curran*
Harmon, Curran, Spielberg &
Eisenberg, LLP
1726 M Street, N.W.
Suite 600
Washington, DC 20036
(e-mail: dcurran@harmoncurran.com)

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Susan L. Uttal, Esq.*
Antonio Fernandez, Esq.*
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(e-mail: slu@nrc.gov)
(e-mail: axf2@nrc.gov)


David A. Repka
Counsel for Duke Energy Corporation